



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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Here We Go Again

Why Democrats Killed the Owen Nomination

The Senate Judiciary Committee's rejection last week of President Bush's nominee to the 5th Circuit Court of Appeals, Priscilla Owen, opens a distressing new chapter in the war over judicial nominations. Justice Owen was not rejected because she is unqualified for the post. . . She was rejected on a party-line vote because she is a conservative. . .

– *The Washington Post*, Editorial, September 13, 2002

Had Democrats relied on substance rather than politics, President Bush's nomination of Texas Justice Priscilla Owen easily would have been approved by the Senate Judiciary Committee. Instead, on September 5, the 10 Democrats on the Judiciary Committee voted *en bloc* to kill the nomination. Justice Owen was defeated on a straight party-line vote while being labeled a "judicial activist," "conservative extremist," and "right-wing ideologue."

Following the committee's vote, Majority Leader Daschle stated, "We will confirm qualified judges. . . Don't send us unqualified people. . . You send us unqualified judges, and they're not going to pass confirmation." Yet, the American Bar Association, whose rating system Judiciary Chairman Leahy has dubbed "the gold standard," unanimously rated her "well-qualified." She has the backing of both of her home-state Senators. Several leading Democrats in Texas, as well as all the major newspapers in the State, endorsed her in her last election – an election in which she garnered 84 percent of the vote. Yet, she was labeled a "conservative extremist." Democrats emptied their bag of political tricks to defeat her because they view conservatism as anathema; they desire to get "payback;" they dislike pro-life judges; they refuse to recognize the legitimacy of the Bush Administration; and they hope to tie Republicans to current business scandals in the minds of voters.

"Degrade the Rule of Law"

- ▶ "And what concerns me is, when you fire parliamentarians and fire the ABA and, you know, put on right-wing justices on the courts, you continue to see even greater and greater degradation of the rule of law."

– Senator Daschle, press conference, May 10, 2001

- ▶ “The Republican candidate for President [George W. Bush] says that his models for judicial nominees are the most conservative current Justices, Antonin Scalia and Clarence Thomas. If they formed the majority in the years ahead, our rights would be greatly diminished. . .”

– Senator Leahy, *Congressional Record*, S11315, October 28, 2000

Liberals regularly seek to achieve through the courts what they cannot achieve through legislation. In confirming a conservative like Owen, they feared their agenda would be thwarted. Therefore, Judiciary Committee Democrats implied Justice Owen was a knuckle-dragging conservative whose rulings would only revert the rights of women, the poor, and minorities.

- ▶ ““Not only does this appellate court represent many people who are poor, many people who are minority, many people who depend on the court for a fair and impartial shake,’ [Senator Feinstein] said. But the court needs a judge that rules ‘based on the law, not on the basis of the justice’s beliefs.’”

– Fox News, September 5, 2002

Get Even

Democrats justify their treatment of nominees by claiming that Republicans did the same thing to President Clinton. For example, before the committee vote on the nomination of Charles Pickering for the Fifth Circuit Court of Appeals, Senator Feingold stated:

“During the last six years of the Clinton Administration, this committee did not report out a single judge to the Fifth Circuit Court of Appeals. . . . So there is a history here, and I think it means that the administration has a special burden to consult in a bipartisan way on nominees for this circuit. Otherwise, we would simply be rewarding the obstructionism that the president’s party engaged in over the last six years by allowing him to fill with his choices seats that his party held open for years, even when qualified nominees were advanced by President Clinton” (3/14/02).

But before Democrats assumed the majority in June of 2001, they repeatedly claimed that a Democratic majority would not engage in “payback” when a Republican President was making judicial nominations. Senator Daschle even made this promise:

“There is going to be no payback. We are not going to do to Republican nominees, whenever that happens, what they have done to Democratic nominees. Why? Because it is not right. Will we differ? Absolutely. Will we have votes and vote against nominees on the basis of whatever we choose? Absolutely. But are we going to make them wait for years and years to get their fair opportunity to be voted on and considered? Absolutely not. That is not right. I do not care who is in charge. I do not care which President is making the nomination. That is not right” (*Congressional Record*, S1365, 3/9/00).

Whether one believes Republicans treated President Clinton's nominees fairly or not, Democrats, in order to retain any sense of credibility, must change either their rhetoric or their actions.

The Liberal, Pro-Abortion Litmus Test

For years, Democrats have stated that litmus tests must be avoided in the judicial confirmation process. Senator Biden once said, "[Judicial confirmation] is not about pro-life or pro-choice, conservative or liberal, it is not about Democrat or Republican. It is about intellectual and professional competence to serve as a member of the third co-equal branch of the Government" (6/24/86). When President Clinton was making nominations, Senator Leahy had this to say:

"Partisan and narrow ideological efforts to impose political litmus tests on judicial nominees and shut down the judiciary have to stop. They hold no place, whether you have a Democrat as President or a Republican as President. The judiciary should not be part of a partisan or ideological power struggle. And I think that all of us as Senators in the most powerful democracy history has ever known have a stake in keeping an independent judiciary" [*Congressional Record*, S75, 1/28/98].

However, after the National Abortion Rights Action League labeled Justice Owen as "someone who exemplifies the most extreme hostility to reproductive rights," Democratic opposition to the nomination grew and the abortion issue was frequently noted.

- ▶ "Democratic Sen. Patrick Leahy, chairman of the committee, and Sen. Dianne Feinstein, D-Calif., who led Owen's nomination hearing in July, opened the Democratic charge against the judge Thursday by calling her a conservative extremist who worked to place barriers to a woman's right to choose an abortion on numerous cases in Texas."

– Fox News, September 5, 2002

During Justice Owen's hearing, Senator Schumer told her that she got an "A+" for the one factor that she could not control – her gender. But when it came to what she – as a woman – believed, she failed. Apparently, Democrats like Senator Schumer believe the courts need more diversity in gender and race . . . unless the nominees are pro-life.

- ▶ "I'm afraid that the main reason Justice Owen is being opposed is . . . because she is a woman in public life who is believed to have personal views that some maintain should be unacceptable for a woman in public life to have. Such penalization is a matter of the greatest concern to me, because it represents, in my opinion, a new glass ceiling for women jurists."

– Senator Hatch, Owen Nomination Hearing, July 23, 2002

- ▶ “. . . At the end of the day, the objections to Justice Owen were almost purely ideological and dominated specifically by the politics of abortion. This is a dangerous road, one that will harm the judiciary and come back to bite the Democrats who rejected Justice Owen.”
– *The Washington Post*, Editorial, September 13, 2002

Send a Message to the White House (and Future Nominees)

- ▶ “Some Democrats were blunt about what they hoped to accomplish [in confrontations over the President’s nominees]. Senator Charles E. Schumer of New York said that in opposing the Pickering nomination they were sending a message to the White House that Mr. Bush should stop trying to stack the courts with conservatives.”
– *The New York Times*, April 7, 2002
- ▶ “We will not be bamboozled. . . . I’d urge Karl Rove, Judge Gonzales, and Attorney General Ashcroft to take heed from today’s votes.”
– Senator Schumer, Owen Nomination Vote Hearing, September 5, 2002

Following the confirmation of John Ashcroft in February of 2001, Democrats trumpeted that vote as a “shot across the bow” to the President that they will defeat conservatives to the Supreme Court via filibuster. Today this “shot” also includes nominees to the lower courts such as Pickering and Owen. Their excuse was and is, as Senator Feinstein indicated, that President Bush did not have a mandate for “skewing the courts” with conservatives because of his narrow victory in 2000. Senator Schumer also noted that America had not elected a 60-seat majority of Senators who would have voted for Owen. He failed to mention that America also did not elect a Democrat Senate majority and that President Clinton only received 43 percent of the vote when elected but still had both of his Supreme Court nominees confirmed with ease.

If the goal of Judiciary Committee Democrats was to send a message, they succeeded. The question is whether the message they actually sent is the one intended:

- ▶ “Rejecting a qualified nominee because of this sort of ideological disagreement sends a chilling message to judges everywhere who might wish for future appointments: Take no risks in writing opinions and keep one eye always on the Judiciary Committee’s sensibilities. It also sends a message to the public that the confirmation process is not a principled exercise but an expression of political power. Both messages are corrosive to the ideals that must animate a first-rate judicial branch.”
– *The Washington Post*, Editorial, September 13, 2002

Pro-Business Bias

One of the issues Democrats have hoped to push during the mid-term elections is the subject of corporate corruption, and Justice Owen’s nomination was an opportunity to revisit Enron.

Democrats focused on the \$8,600 in campaign contributions Justice Owen received from individuals who worked at Enron and the fact that she did not recuse herself from a case in which Enron was a defendant. (Senator Schumer received over \$21,000 from Enron employees in his 1998 Senate run.) They criticized her ruling in favor of Enron, stating it showed her big business bias. Yet the Enron ruling was unanimous with Owen merely the one to write the decision. Two former justices from the same Texas court, Rose Spector and Raul Gonzalez, both Democrats, informed Senator Leahy that the unanimous decision was made on well-settled principles of law.

- ▶ “Some of Owen’s opponents are not content to challenge her record. They have also attacked her as ‘unethical’ primarily because she accepted campaign contributions from Enron and Halliburton but did not disqualify herself when those companies had cases before her court. One liberal activist called her ‘Judge Enron,’ saying that she ‘illustrates the hold that Enron established over the [Texas] courts.’ That is a cheap shot.”

– Steven Lubet, professor of law at Northwestern University and co-author of *Judicial Conduct and Ethics*, *Atlanta Journal and Constitution*, August 28, 2002

They also tried to label Owen “anti-consumer” and “pro-business” by using a few of her rulings to establish a “pattern.” For example, Senator Kennedy stated in the hearing on July 23, 2002, “I see that you have a pattern of siding against the consumer or the victim of personal injury in favor of business and insurance companies. And I’m struck by the fact that when the court does rule in favor of consumers or victims of personal injury, you’re frequently in dissent.” What Owen opponents forgot to mention is that Justice Owen’s record shows she dissented on less than 10 percent of the 900 cases on which she’s ruled.

Mudslinging

When all else failed, Democrats returned to the mudslinging and name-calling. They found that their reasons for defeating Justice Owen were nothing but political excuses to assuage their cohorts in various liberal interest groups, so they tagged her with the epithet “activist” in order to build opposition that would not have existed with an honest examination of her record.

- ▶ “. . . Normally when there is an effort to attack somebody, you find one little thing about them and you blow it out of all proportion. What is so basically disturbing to me about this case is there is no one little thing to blow out of proportion. This attack is created out of whole cloth.”

– Senator Gramm, statement at Owen nomination hearing, July 23, 2002

- ▶ “As a political liberal, I am troubled by the Owen nomination. But as a nonpartisan judicial ethicist, I am even more troubled by the mudslinging. The Democrats on the Judiciary Committee can stand up for integrity by brushing aside the specious charges against Owen and deciding her case on the merits.”

– Steven Lubet, professor of law at Northwestern University and co-author of *Judicial Conduct and Ethics*, *Atlanta Journal and Constitution*, August 28, 2002

But the use of unfounded accusations and labeling of nominees as “activists” were tactics that Democrats claimed to oppose not long ago.

- ▶ “We are turning the word ‘activist’ into something different. . . I think some of my friends on the other side of the aisle think you are an activist if you have a heartbeat or a pulse, if you are alive. Nominees have to have some opinions; that is what a judge does.”
– Senator Boxer, *Congressional Record*, S1341, March 9, 2000
- ▶ “Partisan politics shouldn’t play a part in the confirmation of judges, but they do. But to hold up a well-qualified judge . . . on the basis of unsupported allegations of ‘judicial activism’ is shameful, it takes the impact of politics on this process to an extreme that we have not seen before, and I hope we never see again.”
– Senator Feingold, *Congressional Record*, S1300, March 8, 2000

Hopefully, President Bush in the 108th Congress will re-nominate Justice Owen, Judge Pickering, and any other casualties of Senator Leahy’s Judiciary Committee to a Republican-led Senate that will confirm them based on their superior qualifications.

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